No. 350.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN BAD ELK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 350.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF FOR UNITED STATES.

JAS. E. BOYD,
Assistant Attorney-General.

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FACTS.

Bad Elk, the plaintiff in error, is an Indian, and belongs to the Sioux tribe, in what is called the Pine Ridge Reservation, in the State of South Dakota. On the 13th day of March, 1899, he shot and killed another Indian belonging to the said tribe within the limits of the reservation, named John Kills Back. For this Bad Elk was indicted in the district court of the United States for the district of South Dakota on the 5th of April, 1899 (see

indictment, Record, pp. 2, 3, and 4); was tried upon the said indictment at the said term, convicted by the jury of the crime of murder, and sentenced by the court to be hanged on the 16th day of June, 1899.

For errors assigned upon exceptions taken during the trial and upon the law as held by the court, the case is here upon writ of error for review. The evidence for the prosecution will be found in the record, beginning on page 9 and ending on page 14, and consists of the testimony of B. J. Gleason, High Eagle, Lone Bear, Pine Bird, Shouts At, Alfred Old Shield, Under the Baggage, Brings Plenty, Steel Horses, Dog Chief, and Dr. James R. Walker, and is substantially as follows:

Bad Elk was a policeman in the reservation. On the 8th of March, 1899, Gleason, who was what is called "additional farmer," and who lived near Bad Elk, heard two shots at or near the latter's residence. Shortly after the shooting Gleason saw Bad Elk, and asked him who shot. Bad Elk said that he had shot—that he had only shot into the air for fun. Gleason then told Bad Elk to come around to the office in a little while and they would talk the matter over; but the latter did not come to the office for several days.

On the 13th of March, following the date of the shooting, Gleason gave directions to Lone Bear and Crow, two Indian policemen, to arrest Bad Elk and take him to Pine Ridge Agency to Major Clapp (Clapp being the Indian agent at that place). Crow did not report for duty in making the arrest, and on the afternoon of the 13th of March Gleason sent Lone Bear and High Eagle to make the arrest. These two went to Bad Elk's

mother's, where he was stopping, and came back and reported to Gleason that Bad Elk was not there. Gleason then told them that Bad Elk was not at his mother's, but had gone to his brother's, and he further instructed Lone Bear and High Eagle to watch and see that Bad Elk did not go away, and to take him to the agency at Pine Ridge in the morning. Gleason also directed Lone Bear to have High Eagle assist him in the arrest, and he (Gleason) notified John Kills Back, the deceased, to relieve Bad Elk as a school policeman and assist Lone Bear and High Eagle in making the arrest.

Lone Bear, High Eagle, and John Kills Back started out about dark on the 13th of March to find Bad Elk and to arrest him. Soon after the three started, under the directions of Gleason, the latter heard some shots fired, and the report soon came that John Kills Back had been shot and killed. (See testimony of B. J. Gleason, beginning page 9 of Record.

When Lone Bear and High Eagle were ordered to go and arrest Bad Elk they went first to the latter's mother's house, and, not finding him there, returned and reported the fact to Gleason, who sent them back to find and get the defendant. As the two were returning they saw Bad Elk coming toward his mother's place, and when they arrived there Lone Bear remained outside and High Eagle went into the house. Bad Elk had just returned from looking after the schools, which was part of his duty as a policeman, and was in the house smoking. High Eagle went in and told him that they had come to take him to the agency at Pine Ridge. Bad Elk, however, declined to go that evening, but said

that he would go in the morning. His reason for not going that evening was that his horse was used up and that he would have to go to his brother's and get a horse—that it was too late to start that night. Bad Elk then came out of the house, saddled his horse, and went over to Harrison White Thunder's (another Indian, who is said to be a brother of Bad Elk).

In the meantime John Kills Back had joined the party, and the three—High Eagle, Lone Bear, and Kills Back—followed along some distance behind Bad Elk as he went toward his brother's, but Kills Back and High Eagle stopped at a house before reaching the brother's and Lone Bear followed on to that place. After stopping at his brother's for awhile, Bad Elk rode back to his mother's, and the three—Lone Bear, High Eagle, and Kills Back—rode along a distance behind him, not very close.

On the way back to his mother's Bad Elk stopped on the road and got a Winchester rifle and took it home with him.

The three who had been sent to make the arrest reported to Gleason that Bad Elk had been to his brother's to get a horse, and that he said he would go with them to the Pine Ridge Agency in the morning, and Gleason gave instructions then that they go and watch Bad Elk and see that he did not go away, and to take him to Pine Ridge in the morning. After getting supper, the three started again to the place where Bad Elk was stopping. On the way Lone Bear stopped and High Eagle and Kills Back went on. When they reached the place, they saw Pine Bird and Shouts At, two Indians, standing near the house, and when High Eagle and Kills

Back came near the house they stopped, and Bad Elk came out and said, "What are you here bothering me for?" Kills Back says, "Cousin, you are a policeman and know what the rules and orders are." Bad Elk replied, "Yes, I know what the rules and orders are, but I told you I would go with you to Pine Ridge in the morning." He then shot and hit Kills Back and fired another shot that hit High Eagle's coat near the breast and another one that hit the latter's pants' leg. (The weapon used by Bad Elk at the time, as charged in the indictment, was a six-shooter; see testimony of Under the Baggage, record, p. 14).

Kills Back fell and High Eagle ran away, and as he went by Lone Bear, who was coming up, the latter fired and turned and ran. The shooting was all after dark. There was quite an amount of snow on the ground and Kills Back fell near the fence where there was a bank of snow. A day or two after the shooting, Shouts At, an Indian who was a witness for the prosecution, found a revolver in the snow where Kills Back's hand went in as he fell. (See cross-examination Shouts At, record, p. 13.)

These facts are taken from the testimony of Gleason before cited, and of High Eagle, Lone Bear, Pine Bird, and Shouts At, on pages 11, 12, and 13 of the record.

The defense introduced only two witnesses, Bad Elk himself and his brother, Harrison White Thunder. There is no material disagreement until the scene of the killing is reached, and as to this, Bad Elk, after stating the conversation that was had when High Eagle and Kills Back came back, and Pine Bird and Shouts At

were near the house, says that when he, Bad Elk, said, "I know what the rules are, but told you I would go to the Pine Ridge Agency in the morning," Kills Back leaned forward and put his hand around as if to reach for a gun; that he, Bad Elk, saw the gun and shot. He then shot twice more, and Kills Back and High Eagle ran off, Kills Back falling after he had gone a short distance. "I shot," says Bad Elk, "because I knew that they, Kills Back and High Eagle, would shoot me; I saw their revolvers at the time I shot." Bad Elk also states that he borrowed a Winchester rifle that afternoon from Brings Plenty, and that he got it to shoot prairie chickens; that when he got to where he was stopping he threw the gun on the house and went in; that he afterwards threw the gun under the bed. Harrison White Thunder testifies that Bad Elk came to his house and wanted to get a horse to go to Pine Ridge Agency; that his horses were out on the range, and that he told him he would bring him one in the morning. (See testimony of Bad Elk and White Thunder, pp. 15 and 16 of the record.)

It appears from the testimony of Steel Horses that the Winchester rifle had been given to one of the policemen before the killing occurred.

ARGUMENT.

The only point raised by the counsel for the plaintiff in error which I am inclined to discuss is that the court exceeded its power in imposing the death sentence in this case. The broad ground is taken that, under the law as

it stands, an Indian can not be punished with death, but is liable only to imprisonment in case of conviction of a crime for which a white man can be executed. I can not agree to this proposition.

A leading case upon this question is *Ex parte* Crow Dog (109 U. S., 556), but that decision was anterior to the time that the former Territory of Dakota came into the Union as two States, North and South Dakota, and before the legislation relative to the jurisdiction of the courts of the United States over crimes committed in Indian reservations which I refer to hereafter. It was held in that case that there was no law or treaty at that time which had the effect to repeal or abrogate the provisions of section 2146 of the Revised Statutes, which excepts from the general jurisdiction of the courts of the United States offenses committed in the Indian country by one Indian against the person or property of another Indian. But since that case was decided, the act of March 3, 1885 (23 Stat., 385), has been passed. I call the attention of the court particularly to the latter clause of the said act, which read as follows:

> And all such Indians committing any of the above crimes [murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny] against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Crow Dog's case was decided at October term, 1883, and from the fact that the legislation above referred to followed so closely, I think it reasonable to conclude that the object of the act of March 3, 1885, was to change the situation which that decision disclosed and to place the Indians living upon reservations within the States or Territories of the United States within the jurisdiction of the Federal courts for trial, and to attach punishment in case of conviction the same as would attach to other persons under the laws of the United States.

The constitutionality and effect of the statute of March 3, 1885, was passed upon by this court in the case of the *United States* v. *Kagama and another*, reported in 118 U. S., 375. In that case the said act is held to be constitutional and to confer jurisdiction upon the courts of the United States of the offense of murder committed by one Indian upon the body of another within an Indian reservation situated within the limits of a State, as in the case now under consideration. Kagama murdered another Indian by the name of Iyouse within the limits of the Hoopa Valley Reservation in the State of California, and the case was passed upon by the Supreme Court upon six questions certified from the circuit court for the district in which Kagama was tried. The point of all the questions was well set out in the third and sixth. In the third it was asked whether the provision of section 9 of the said act is a constitutional and valid law of the United States. The sixth asked whether the courts of the United States have jurisdiction to punish an Indian belonging to an

Indian tribe for committing murder upon another Indian belonging to the same tribe within an Indian reservation. The substance of the decision in the case is to answer these two questions in the affirmative.

There is still another case—*In re Gon-shay-ee* (130 U. S., 343)—in which it is held by the Supreme Court that the act of March 3, 1885, was enacted to transfer to Territorial courts the jurisdiction to try the crimes described in it, including that of murder under Territorial laws when sitting as and exercising the functions of a Territorial court, and not when sitting as or exercising the functions of a circuit court of the United States under section 1910. The case of Gon-shay-ee is cited only to call the attention of the court to the language of the opinion on page 350, in which it says, referring to the portion of the act of March 3, 1885, now under consideration: "This is the last section of the Indian appropriation bill for that year, and it is very clearly a continuation of the policy upon which Congress entered several years previously, of attempting, so far as possible and consistent with justice and existing obligations, to reduce the Indians to individual subjection to the laws of the country and dispense with their tribal relations."

These decisions seem to be so conclusive of the matter that I do not deem it necessary to pursue it further.

The other assignments of error, based upon the exceptions taken to the admission of testimony and portions of the charge of the court, I am content to leave to be considered upon the record and the argument presented by the counsel for the plaintiff in error. I take this

course because, upon an examination of the testimony, and considering the circumstances under which this homicide was committed, I am not satisfied that this Indian ought to be executed.

I have investigated the matter carefully and I am free to admit that I have not been able to find any law or regulation which made the mere discharging of a gun within an Indian reservation a criminal offense, nor from what source the person called "additional farmer" derives authority to order an arrest upon a reservation for an alleged offense. The right to prescribe regulations and establish rules for the carrying into effect of the various provisions of law relative to Indian affairs is conferred upon the President by section 465 of the Revised Statutes, and it is held in *Wilcox* v. *Jackson* (13 Pet., 498), which decision is followed in 7 Op. Atty. Gen., 453, that the President speaks and acts through the heads of the several Departments in relation to subjects which pertain to their respective duties. The rules for the Indian police service will be found in "Regulations of the Indian Office, with an appendix containing the forms used," published by authority of the Secretary of the Interior, 1894, on pages 55, 56, 57, and 58. On page 57 is Rule XVI, as follows:

> Before making an arrest, it needs only to be ascertained that the offense charged constitutes a crime or misdemeanor for which a person can be lawfully detained, and that the ground for the charge is reasonable.

There does not appear in the rules and regulations any method of procedure by which it is to be ascertained

whether a crime or misdemeanor has been committed, or if there is reasonable ground to charge any person with having been guilty of an offense; nor is there any direction as to whether orders for arrest shall be in the nature of a written warrant or given orally.

I can very well understand how this Indian, when he saw High Eagle, Lone Bear, and Kills Back following him about through the neighborhood, should become somewhat apprehensive. The movements of these men, who had orders to arrest him, were probably, from Bad Elk's standpoint, mysterious. They would keep at a distance from him as he was passing about from one place to another, and would then disappear and report to the additional farmer, and again they would return. And finally, after dark, they came to the place where he was, and the unfortunate killing took place as described. I think that, although it was unintentional on his part, the additional farmer who ordered this pursuit of Bad Elk was largely responsible for the homicide. While I do not feel at liberty to criticise him severely, I must say that I can not see what necessity there was, upon the trivial charge which appears against Bad Elk, for the detail of three armed men to shadow him about through the neighborhood, as was done in this instance.

I have therefore concluded that this is not a case in which the life of the plaintiff in error ought to be taken as a punishment. I have not found enough in the record to warrant me in filing a confession of error as to any of the assignments upon exceptions taken to the testimony or charge of the court; but, as I before stated, I have determined to submit these matters for the consideration

of the court upon the record and brief of the counsel for the plaintiff in error.

In view of what I have said, I think it is fitting for me to state that if the court shall, as I submit it must, affirm the judgment, the Department of Justice will feel constrained to present the case to the President as a proper one for the exercise of clemency by a commutation of the sentence.

JAS. E. BOYD,
Assistant Attorney-General.

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